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No. 07-814

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DONALD A. BEALER; MARIANNE C. BEALER;
JAMES R. BEALER (WITHDRAWN),

Petitioners,

v.

THE MUTUAL FIRE, MARINE AND
INLAND INSURANCE COMPANY; THE FRANKLIN
HOMEOWNERS ASSURANCE COMPANY;
FHA HOLDING COMPANY; MIKE PETRELIA,
INDIVIDUALLY AND AS CFO & TREASURER;
FRANK MCCALL, INDIVIDUALLY AND
AS ASSISTANT CONTROLLER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the Third Circuit's Opinion affirming the District Court's analysis dismissing the claims which failed to plead causes of action upon which relief could be granted correctly applied Pennsylvania law on the state tort claims and on the federal RICO claim?

2. Whether Petitioners have presented compelling reasons to grant the Petition, where the Third Circuit's Opinion affirming the District Court's entry of summary judgment based upon the applicable statute of limitations correctly held that Petitioner's claims were time-barred under Pennsylvania law?

CORPORATE DISCLOSURE STATEMENT

Respondent Mutual Fire, Marine and Inland Insurance Company is a mutual insurance company. It does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondent FHA Holding Company, Inc. is a wholly owned subsidiary of its parent corporation, Respondent Mutual Fire, Marine and Inland Insurance Company. There is no publicly held company that owns 10% or more of its stock.

Respondent Franklin Homeowners Assurance Company is a wholly owned subsidiary of its parent corporation, Respondent FHA Holding Company, Inc. There is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

Mr. Bealer, a *pro se* litigant, sought payment for actuarial services he claimed he performed from 1997 through 2003, for Respondent Mutual Fire, Marine and Inland Insurance Company and its related entities. His claims for relief, however, included causes of action which exceeded those permitted by Pennsylvania law as well as included an unfounded assertion of a RICO violation. His claims, like his instant Petition to this Court, were filled with fanciful delusions of crimes, lies and intrigue, which ran a course of insidious conspiracy and bias against him from the halls of Pennsylvania's capital and its Supreme Court, to the Governor's mansion, and on to the United States District Court for the Eastern District of Pennsylvania and the Third Circuit.

None of Mr. Bealer's assertions proved to have even a tincture of merit. Upon a review of his claims, the District Court determined correctly that most of the tort based claims and the RICO claims should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because they failed to state a claim upon which relief could be granted. On August 31, 2005, the Mutual Fire Parties conducted an initial deposition of Mr. Bealer. Certain admissions made by Mr. Bealer during that deposition established that all of his contract claims except those arising after 2003, and his remaining tort claim (tortious interference), were time-barred. Based upon Mr. Bealer's deposition testimony, the Mutual Fire Parties filed a motion for partial summary judgment seeking a dismissal of

these time-barred claims. By Order dated February 2, 2006, the District Court granted the Mutual Fire Parties' motion for partial summary judgment. Accordingly, the only remaining claims were Mr. Bealer's contract claims for services allegedly performed in 2003, which claims the parties settled on the morning of trial by payment to Mr. Bealer of $8545.

REASONS FOR DENYING THE WRIT

Petitioners have not identified any reason, let alone a compelling one, justifying the grant of their Petition. The Third Circuit has not entered a decision in conflict with a decision of another United States court of appeals, has acted in the acceptable and usual course (as has the District Court) and has decided no issue which should be settled by this Supreme Court or which conflicts with the decisions of this Supreme Court. *See* Sup. Ct. R. 10(a), (c). There is no conspiracy against Mr. Bealer and no effort by the entire state and federal judicial system to align against him. The August 1, 2005 Order granting, in part, the Mutual Fire Parties' 12(b)(6) motion to dismiss addressed comprehensively each and every legal argument raised by Mr. Bealer. There was no error of law or abuse of discretion – Mr. Bealer's claims simply failed to plead a cognizable cause of action, and those counts were properly dismissed.

Likewise, the February 1, 2005 Order, granting the Mutual Fire Parties' motion for summary judgment recognized correctly that the contract counts and tortious interference claim were time-barred by the four-year and two-year statute of limitations, respectively. Despite providing Mr. Bealer every opportunity to support his claims against the Mutual Fire Parties, there were no disputed issues of fact regarding this defense – Mr. Bealer simply waited too long to bring them.

I. PETITIONER'S AMENDED COMPLAINT FAILED TO PLEAD CERTAIN TORT CLAIMS AND A RICO ACTION JUSTIFYING THE DISMISSAL OF THOSE CLAIMS.

The District Court was correct to grant the Mutual Fire Parties' Rule 12(b)(6) motion to dismiss, and the Third Circuit was correct to affirm. The tort claims asserted in Counts Two, Five and Seven (negligence, negligent misrepresentation and fraud, respectively) were derivative of Mr. Bealer's breach of contract claim in Count One and were barred by the "gist of the action doctrine". The "gist of the action doctrine" provides that tort claims which are derivative of a contract claim and which are alleged to have arisen during the course of a contractual relationship precludes those tort claims and justifies their dismissal. *etoll, Inc. v. Elais/Savion Adver., Inc.*, 811 A.2d 10, 19 (Pa. Super. 2002); *Bash v. Bell Telephone*, 601 A.2d 825 (Pa. Super. 1992).

Likewise, Mr. Bealer's defamation claims in Counts Three and Four (slander and libel respectively) had no merit. The alleged defamatory statement that Mr. Bealer was adamant about not altering the contents of his actuarial reports was incapable of a defamatory meaning and did not imply any undisclosed false facts. *See Paravo v. O'Connor*, 641 A.2d 607, 609 (Pa. Super. 1994) (statements not capable of a defamatory meaning, while embarrassing or expressions of opinion, are not the sort which will support a defamation claim). *See also, U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 917 (3d Cir. 1990), rehearing denied, cert. denied, *Independence Blue Cross v. U.S. Healthcare*, 111 S. Ct. 58, 498 U.S. 816, 112 L. Ed. 2d 33 (1991); *Rockwell v. Allegheny Health Education & Research Foundation*, 19 F.Supp.2d 401 (E.D. Pa. 1998) (to state a claim for defamation plaintiff must prove defamatory character of communication).

Nor did Mr. Bealer plead a claim for intentional infliction of emotional distress in Count Eight. Mr. Bealer failed to plead any conduct that was outrageous enough in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. *Johnson v. Caparelli*, 625 A.2d 668, 671 (Pa. Super. 1993). His allegations that the Mutual Fire Parties were "difficult" clients could not support a claim for intentional infliction of emotional distress.

Finally, Mr. Bealer's RICO claims in Count Nine were also defective. In order to state a RICO claim under section 1962(c), a plaintiff must allege the following four elements:

(1) the existence of an enterprise affecting interstate commerce;

(2) that the defendant was employed by or associated with the enterprise;

(3) that the defendant participated in the conduct or the affairs of the enterprise; and

(4) that the defendant participated in the enterprise's affairs through a pattern of racketeering activity.

Shearin v. E. F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989); *Steco, Inc. v. S & T Mfg.*, 772 F.Supp. 1495, 1497-98 (E.D. Pa. 1991); *Salendor v. Mazzacone*, 686 F.Supp. 528, 530 (E.D. Pa. 1987). Section 1962(d) of Title 18, United States Code, states: "[i]t shall be unlawful for any person to conspire to violate any of the provisions of the subsections (a), (b) or (c) of this section." Accordingly, in order to plead a conspiracy under § 1962(d), a plaintiff first must state a claim under § 1962(c).

Mr. Bealer's RICO count arguably involved two RICO claims: 1) conspiracy to steal services, and; 2) using the U.S. Mail to defraud insurance regulators and policy holders by pressuring Mr. Bealer into preparing actuarial reports and opinions based upon false and misleading information. After noting that

"racketeering activity," under 18 U.S.C. § 1961(1) has been held by the Third Circuit to exclude theft of services, the District Court dismissed Mr. Bealer's allegations of theft of services as not supporting a RICO claim. *Annulli v. Panikkar*, 200 F.3d 189, 198 (3d Cir. 1999).

The District Court then noted, and the Third Circuit agreed, that Mr. Bealer's RICO claim that the individual defendants used the U.S. Mail to defraud insurance regulators and policy holder by pressuring Mr. Bealer into preparing actuarial reports and opinions based upon false and misleading information could support a RICO claim under § 1962(d) only if he could show that he had suffered an actual injury to his business or property and that the injury was caused by the defendants racketeering activity. *Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3d Cir. 2000). His claims of damage were so intangible or so indirect and attenuated, he failed to plead the causation requirement necessary to support his claim. Mr. Bealer did not allege any causes of action under any sections of the RICO statutes.

II. THE ENTRY OF SUMMARY JUDGMENT PROPERLY DISMISSED PETITIONER'S TIME-BARRED CLAIMS.

The Third Circuit was correct to affirm the grant the Mutual Fire Parties' motion for summary judgment. The remaining contract and tortious interference claims were filed outside the applicable statute

of limitations. Pennsylvania law provides that an action upon a contract, either written or unwritten, must be commenced within four years of the date that the cause of action arose. 42 P.S. § 5525; *Sevast v. Kakuras*, 841 A.2d 1062, 1070 (Pa. Super. 2003). *See also, Colonial Assurance Co. v. Mercantile and General Reinsurance Co. Ltd.*, 297 F.Supp.2d 764 (E.D. Pa. 2003) (cause of action in contract accrues at time of the breach). On actions to collect payment for services rendered, the statute begins to run from each payment as it becomes due. *Fresh Start Industries, Inc. v. ATX Telecommunications Services*, 295 F.Supp.2d 521, 523 (E.D. Pa. 2003).

The action was commenced on or about December 20, 2004. Accordingly, any claim for breach of contract that occurred on or before December 19, 2000, was barred by the four-year statute of limitations. Mr. Bealer admitted that he has been paid for all services rendered in 2000, 2001 and 2002. The claims for services performed in 1997 through 1999, as they were over four years old, were therefore time barred. Only the contract claim for approximately $8500.00 for the services performed in 2003 was filed timely, and that claim was ultimately settled by the parties.

Pennsylvania courts apply the two-year statute of limitations to tortious interference with contractual relations claims. *CGB Occupational Therapy Inc. v. RHA Health Services Inc.*, 357 F.3d 375, 378 (3d Cir. 2004); 42 P.S. § 5524. The statue of limitations begins to run when the alleged interference occurred. *Bednar v. Marino*, 646 A.2d 573, 577 (Pa. Super.

1994). The only definitive occurrence alleged or testified to by Mr. Bealer to support a claim of tortious interference occurred in March and April of 2001, when the Mutual Fire Parties allegedly made unreasonable demands upon him causing him to lose all of his clients. It was at that point that Mr. Bealer's cause of action for tortious interference arose, if he had one at all. He failed to institute that action within two years, however, and it was properly dismissed as untimely.

Mr. Bealer failed to identify any other instances that could be considered tortious interference despite being repeatedly requested to do so. On many occasions he simply refused to identify the contracts and or the persons with whom the Mutual Fire Parties allegedly interfered and testified that he would not do so even if ordered by the Court. Under these circumstances, then, the only tortious interference claim stated and the only tortious interference claim to which Mr. Bealer was willing to testify, or provide any discovery, arose in March or April of 2001. Because this claim was time barred by the applicable two-year statute of limitations, it was properly dismissed.

CONCLUSION

Petitioners have identified no compelling reasons for this Court to intervene in this matter and exercise its supervisory powers. The petition for writ of certiorari should be denied.

Respectfully submitted,

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